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The Tick of the Statute of Limitations Clock: How the FRCD Preempts the State Law Accrual Date in Freier v. Westinghouse Electric Corporation

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THE TICK OF THE STATUTE OF LIMITATIONS CLOCK: HOW THE FRCD PREEMPTS THE STATE LAW ACCRUAL DATE IN *FREIER V. WESTINGHOUSE ELECTRIC CORPORATION*

I. INTRODUCTION

Toxic waste landfills pose significant health risks to neighboring communities and introduce complex political questions about how this country should manage its hazardous waste.[1] In the 1950s, the chemical industry recognized that abandoned landfills could potentially leach dangerous materials into the environment.[2] This country, however, did not confront the issue of toxic waste until the late 1970s, with publicized incidents such as Valley of the Drums and Love Canal.[3] In response to public concern about environmental and human health threats posed by hazardous waste, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.[4] Congress de-

1. *See* Kristen Chapin, Comment, *Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 129, 129 (1993) (discussing societal implications and public health risks of toxic waste landfills); Hudson River Fishermen's Ass'n v. Westchester County, 686 F. Supp. 1044, 1045 (S.D.N.Y. 1988) (noting serious political questions exist concerning hazardous waste disposal); *see also* Jeffrey Spear, Student Article, *Remedy Selection Under CERCLA and Our Responsibilities to Future Generations*, 2 N.Y.U. ENVTL. L.J. 117, 119-20 (1993) (discussing current debate surrounding toxic waste landfills and impact of dumping today on future generations).

2. *See Hudson River Fishermen's Ass'n*, 686 F. Supp. at 1045-46 (describing lack of "scientific know-how" in early twentieth century and failure to recognize environmental threat posed by toxic waste "time-bombs"); United States v. Hooker Chem. & Plastics Corp., 850 F. Supp. 993, 1048-50 (W.D.N.Y. 1994) (noting state of knowledge and industrial practices in 1940s and 1950s).

3. *See* James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 254-55 (2000/2001) (describing recognition of toxic waste dump problems). Valley of the Drums "involved a vast quantity of illegally disposed material" and "was one of the earliest and most serious hazardous waste sites;" it motivated Congress to develop the Superfund law. EPA EMERGENCY RESPONSE PROGRAM, *Photos – Valley of the Drums, at* http://www.epa.gov/superfund/programs/er/resource/d1_06.htm (last updated Sept. 30, 2002); *see* Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1101 n.4 (E.D. Tenn. 1996) (describing events that occurred at Valley of the Drums). Love Canal involved a public health crisis resulting from the burial of chemical wastes in the Love Canal landfill during the 1970s. *See* United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988).

4. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2001) [hereinafter CERCLA] (establishing federal program to clean up abandoned hazardous waste sites throughout United States);

signed CERCLA as a long-range approach to remedy the adverse consequences of improper disposal, improper transportation, and improperly maintained or closed disposal sites.[5]

Past disposal practices required immediate attention and the original CERCLA legislation rendered unsatisfactory.[6] Some restrictive state limitation statutes barred parties from bringing CERCLA claims because the statutes began to run at the time of the first injury instead of when the party "discovered" that a hazardous substance caused the injury.[7] In response, Congress enacted and superimposed the "Superfund Amendments and Reauthorization Act of 1986" (SARA) into CERCLA.[8] Unlike the original CERCLA legislation, SARA provided new enforcement tools to seek recovery from responsible persons.[9] To ensure that injured parties did not forfeit their claims, SARA amended CERCLA section 309 (42 U.S.C. § 9658) and provided a federally required commencement date (FRCD).[10] The FRCD preempts state statutes of limitation if (1) the claims are based on hazardous substance releases and (2) the state limitations period provides a commencement date earlier than federal law.[11]

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see Spear, *supra* note 1, at 119 (noting importance of Love Canal in enactment of CERCLA and Congressional motivation behind CERCLA generally).

5. *See* Knox v. AC & S, Inc., 690 F. Supp. 752, 757 (S.D. Ind. 1988) (discussing CERCLA provisions regarding ongoing pollution) (quoting INJURIES AND DAMAGES FROM HAZARDOUS WASTES – ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES; A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 97th Cong., 2d Sess. (1982)); *see also* Spear, *supra* note 1, at 119 (commenting on CERCLA's long-range goals).

6. *See Hudson River Fishermen's Ass'n*, 686 F. Supp. at 1045 (discussing indiscriminate past dumping practices and addressing need to alter hazardous waste disposal in future).

7. *See* JAMES T. O'REILLY & CAROLINE B. BUENGER, RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS § 9:17 (2d ed. 2003) (describing problems with restrictive state limitations statutes). Statutes of limitation determine when an injured party may bring a hazardous substance exposure claim. *See generally*, BLACK'S LAW DICTIONARY 1422-23 (7th ed. 1999) (defining "statute of limitations").

8. *See generally* Ohio v. EPA, 838 F.2d 1325, 1327 n.1 (D.C. Cir. 1988) (noting enactment of SARA and its subsequent effect on CERCLA).

9. *See* EPA SUPERFUND, *SARA Overview*, *at* http://www.epa.gov/superfund/action/law/sara.htm (last updated Oct. 21, 2003) (describing SARA's additions and changes to CERCLA legislation); *see also* MacAyeal, *supra* note 3, at 254-55 (discussing enactment of Superfund legislation).

10. *See* Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 184 (2d Cir. 2002) (noting SARA's creation of uniform starting date for statutes of limitation to run); *see also* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter SARA] (extending CERCLA goals); 42 U.S.C. § 9658 (discussing fully FRCD).

11. *See* Angeles Chem. Co. v. Spencer & Jones, 51 Cal. Rptr. 2d 594, 599 (Cal. Ct. App. 1996) (explaining circumstances where FRCD preempts state statutes of

CERCLA allows the federal government to successfully respond to this country's toxic waste problem by making "those responsible for problems caused by the disposal of chemical poisons bear the costs of remedying the harmful condition they created."[12] For example, *Freier v. Westinghouse Electric Corp.*[13] involved Pfohl Landfill (Landfill), identified by the Environmental Protection Agency (EPA) as an "uncontrolled hazardous waste site."[14] When the Landfill was active, operators (defendants) buried waste in drums and "into excavated areas of the facility."[15] More than sixty people (plaintiffs) alleged that they received personal injuries from toxic substances stored in the Landfill.[16] The Second Circuit Court of Appeals interpreted the FRCD discovery-of-cause standard, which defines the time at which any statute of limitation runs as "the date the [claimant] knew (or reasonably should have known) that the personal injury" was caused or affected by hazardous materials.[17] The Second Circuit held that triable issues of fact existed regarding when the plaintiffs reasonably should have known that the Landfill materials caused their injuries.[18]

This Note examines CERCLA statutory authority concerning FRCD accrual dates for the preemption of statutes of repose and limitation.[19] Section II of this Note begins with a brief summary of

limitation) (quoting Tower Asphalt, Inc. v. Determan Welding & Tank Serv., Inc., 530 N.W.2d 872, 875 (Minn. Ct. App. 1995)).

12. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (noting CERCLA's creation of accountability standards for parties dealing with toxins) (quoting United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)); *see* State v. Motorola, Inc., 774 F. Supp. 566, 569 (D. Ariz. 1991) (discussing "tools" given to federal agencies by Congress to address toxic issues in CERCLA).

13. 303 F.3d 176 (2d Cir. 2002).

14. *See generally* EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *Auxiliary Information: National Priorities List, Proposed Rule and Final Rule,* Internet Volume 6, Number 1, 51 (2003), *at* http://www.epa.gov/superfund/sites/auxil.pdf (last visited Nov. 5, 2003) (listing sites EPA considers as uncontrolled hazardous waste sites).

15. EPA REGION 2 CONG. DIST. 30, *Pfohl Brothers Landfill NPL Listing History,* 1 (2002), *available at* http://www.epa.gov/region02/superfund/npl/0201751c.pdf (last visited Nov. 23, 2003) (giving detailed site description of Landfill activities and contents).

16. *See Freier,* 303 F.3d at 183 (discussing plaintiffs' personal-injury claims addressed by Second Circuit).

17. *Id.* at 184 (providing definition of FRCD and noting that it provides standard date for start of statute of limitations period) (quoting 42 U.S.C. § 9658(b)(4)(a)).

18. *See Freier,* 303 F.3d at 182 (noting court's interpretation of date when plaintiffs should have known they were injured by Landfill).

19. *See, e.g.,* O'REILLY & BUENGER, *supra* note 7, § 9:17 (explaining purpose of FRCD accrual dates).

the facts of *Freier*.[20] Section III explains relevant case law surrounding CERCLA and the FRCD.[21] Section IV discusses the *Freier* court's analysis of relevant statutory language and case law.[22] Section V analyzes whether the Second Circuit's determination was proper.[23] Finally, section VI of this Note evaluates the impact of the *Freier* court's holding regarding the FRCD's authority under 42 U.S.C. § 9658.[24]

II. FACTS

In *Freier*, the Landfill owned and operated by third-party defendants Pfohl Brothers and Pfohl Enterprises in Cheektowaga, New York allegedly caused the plaintiffs to develop cancer.[25] The Pfohl Landfill covers 120 acres and borders Aero Lake's fishing and swimming site.[26] Three tributaries flow through the Landfill and feed Ellicott Creek, which is within a few hundred feet of the Landfill.[27]

The plaintiffs filed complaints in the United States District Court for the Western District of New York between 1995 and 1997.[28] The plaintiffs alleged that exposure to toxic waste depos-

20. For a discussion of the facts of *Freier*, see *infra* notes 25-42 and accompanying text.

21. For a discussion of CERCLA and the statutory and judicial background of section 309 (42 U.S.C. § 9658), see *infra* notes 43-106 and accompanying text.

22. For a narrative analysis of the *Freier* decision, see *infra* notes 107-69 and accompanying text.

23. For a critical analysis of the *Freier* decision, see *infra* notes 170-93 and accompanying text.

24. For a discussion of the impact of the *Freier* decision on federal jurisprudence, see *infra* notes 194-207 and accompanying text.

25. *See Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 182-83 (2d Cir. 2002) (discussing plaintiffs and third-party defendants involved in suit).

26. *See id.* at 182 (explaining Landfill's rough geography and details of environs around Landfill). When the Landfill was in operation, it accepted "solid and liquid chemical wastes and sludges, including heavy metals . . . and volatile organic compounds (VOCs)," from area businesses that used petroleum and solvents. EPA REGION 2 CONG. DIST. 30, *supra* note 15, at 1. A fence restricted access to most of the site; drainage ditches with runoff from the Landfill, however, were outside of the fenced area and accessible to the public. *Id.*

27. *See Freier*, 303 F.3d at 182 (describing Landfill and connections to creeks). Several drainage ditches discharged into Ellicott Creek, a body of water used by the community for recreational fishing. *See* EPA REGION 2 CONG. DIST. 30, *supra* note 15, at 1. Ellicott Creek intersects with the Niagara River, an international waterway between Canada and the United States. *See Freier*, 303 F.3d at 182-83.

28. *See Freier*, 303 F.3d at 182-83 (discussing plaintiffs' complaints and claims asserted under New York State law). Some of the claims were survival claims filed on behalf of decedents. *See id.* at 183.

ited in the Landfill caused the parties to develop cancer.[29] Most plaintiffs had lived, worked or recreated near the Landfill.[30] Between 1946 and 1969, the defendant companies sent hazardous waste materials from their manufacturing operations and deposited them into the Landfill.[31]

The district court dismissed the plaintiffs' state law tort claims for personal injuries as untimely.[32] The court ruled that, under CERCLA, the plaintiffs' claims accrued when they "knew or with reasonable diligence should have known" that exposure to the Landfill's hazardous substances caused their injuries.[33] The court

29. *See id.* at 183 (noting that actions were consolidated in district court). The plaintiffs filed state law survival, wrongful death, personal injury and loss-of-consortium claims. *See id.* The plaintiffs sought compensatory and punitive damages using strict liability, negligence, gross negligence and failure to warn theories. *See id.* The plaintiffs asserted federal jurisdiction by showing diversity of citizenship. *See id.* New York law governed the plaintiffs' claims in all areas where federal law did not preempt them. *See id.*

30. *See id.* (discussing multiple ways that plaintiffs or decedents were exposed to toxins in Landfill). Some plaintiffs used the Landfill as ingress to Aero Lake. *See id.* Some of the plaintiffs' children played in the Landfill. *See id.* Also, when Ellicott Creek overflowed, adjacent residential properties were flooded. *See id.* The candidates in the Cheektowaga State Assemblyman elections confronted the environmental issues surrounding the Pfohl Brothers Landfill during the campaign. *See generally State Assemblyman*, CHEEKTOWAGA TIMES, Nov. 2, 2000, *available at* http://www.cheektowagatimes.com/News/2000/1102/Political/02.html (last visited July 29, 2003) (noting community environmental issues and their central role in local politics). Moreover, the Landfill "has been listed in the New York State Registry of Active Hazardous Waste Disposal Sites" since 1983. *Freier*, 303 F.3d at 183.

31. *See Freier*, 303 F.3d at 183 (citing defendants' 23-year use of Landfill as repository for hazardous waste). The plaintiffs alleged that exposure to ambient hazardous substances released from the Landfill or those released during transport to the Landfill caused the cancer. *See id.* When the Landfill was active, "operators buried some of this waste in drums and placed the remaining wastes directly into excavated areas of the facility." EPA REGION 2 CONG. DIST. 30, *supra* note 15, at 1. As of July 6, 2000, between 5,000 and 6,000 drums had been removed from the Landfill. *See Aero to Stay Open Until Cleanup is Set*, CHEEKTOWAGA TIMES, July 6, 2000, *available at* http://www.cheektowagatimes.com/News/2000/0706/Front_Page/01.html (last visited Nov. 4, 2003).

32. *Freier*, 303 F.3d at 182 (discussing action in district court and its justifications for dismissing plaintiffs' claims).

33. *See id.* (noting district court's grant of partial summary judgment). After discovery limited to questions regarding the statute of limitations, the defendants moved for partial summary judgment in two stages to dismiss the plaintiffs' claims on grounds that they were untimely. *See id.* at 184. Then, in June 1997, the defendants sought dismissal of the wrongful death, survival and loss-of-consortium claims. *See id.* The defendants believed the plaintiffs' survival claims were barred by CPLR section 214(5)'s three-year limitations period because the relevant first exposures to hazardous waste occurred no later than 1968, and the suits commenced beginning in 1995. *See id.* at 184-85. The defendants contended that CPLR section 214-c(2)'s three-year limitations period ran from either the date of the injury's discovery or from the date that the injury should have reasonably been discovered, whichever was earlier. *See id.* at 185. Based on these dates, the defend-

found that the plaintiffs should have suspected the cause of their injuries no later than the end of 1991.[34] The court further concluded that, even under 42 U.S.C. § 9658, the relevant statute of limitations barred the plaintiffs' claims asserted in 1995.[35]

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ants also contended that almost all remaining survival claims would be barred. *See id.* The defendants felt similarly about the wrongful death claims, suggesting that they were barred because they arose two years after decedents' deaths, and that underlying loss of consortium claims could not be maintained. *See id.* The defendants further argued that the FRCD did not apply to claims related to deaths other than those of the plaintiffs. *See id.* They also argued using the FRCD was unconstitutional because the preemption of state laws regarding accrual dates for causes of action and state statutes of limitation exceeded Congress's Commerce Clause powers and violated the Tenth Amendment. *See id.*

In opposing the summary judgment motion, the plaintiffs asserted that, in accordance with the FRCD, their survival and wrongful death claims "accrued no earlier than the date on which they knew or reasonably should have known the cause of the injuries, arguing that the FRCD preempts state law with respect to the dates on which their claims accrued if state law would use an earlier date." *Id.* The plaintiffs argued that, before Doctors Rigle and Sawyer wrote the "Pfohl Environmental Health Study" on December 19, 1994, the plaintiffs should not be charged with knowledge of the cause of their injuries. *See id.* The study concluded that "persons frequenting the vicinity of the Landfill had an increased risk of developing cancers, including cancers of the types suffered by [the] plaintiffs and their decedents, because of the toxic wastes stored at the Landfill." *See id.*

On October 27, 1998, in *In re Pfohl Bros. Landfill Litig.*, 26 F. Supp. 2d 512 (W.D.N.Y. 1998) (*Pfohl I*), the district court granted the defendants' motion in part and denied it in part. *See id.* at 185-86. The court found that if federal law did not apply, the plaintiffs' wrongful death and survival claims would be time-barred. *See id.* The district court ruled that if state law set an earlier accrual date, § 9658 would be triggered and the FRCD would preempt state law toxic tort claim accrual dates. *See id.* at 186. After analysis, the court maintained that the FRCD superseded New York's date of death accrual date for toxic tort claims. *See id.* The court also denied the defendants' challenges to the constitutionality of the FRCD, as well as the defendants' motion to dismiss survival claims asserted prior to December 19, 1995. *See id.* at 186-87. All later claims were dismissed. *See id.* at 187. Additionally, the court rejected the defendants' motion to dismiss wrongful death claims because they were timely, and consequently the loss-of-consortium claims were saved. *See id.*

34. *See id.* at 182 (setting time when plaintiffs should have suspected cause of their injuries).

35. *See id.* (justifying district court conclusion that plaintiffs' claims were barred by statute of limitations). In November 1997, the defendants filed a second motion for partial summary judgment seeking dismissal of the plaintiffs' personal injury claims. *See id.* at 187. The defendants argued that those claims were barred by the one-year statute of limitations because they accrued at the end of 1991 at the latest, when sufficient information existed to put a reasonable person on notice to determine whether a causal connection existed between the Landfill and the plaintiffs' cancer. *See id.*

To support their constructive notice theory, the defendants submitted official communications of caution: (1) newspaper articles reporting New York State (State) Departments of Health (DOH) and Environmental Conservation (DEC) studies and (2) public concern regarding the possibility of hazardous wastes in the Landfill. *See id.* The defendants argued that the public displays and reports were sufficient to put the plaintiffs on notice as to the Landfill's potential health hazards. *See id.* at 189. The plaintiffs instead contended that the earliest they

The plaintiffs appealed to the Second Circuit Court of Appeals.[36] There, the plaintiffs argued that the district court erred in ruling that they should have known no later than the end of 1991 that the Landfill caused their injuries.[37] The plaintiffs also asserted that the court incorrectly applied a one-year, instead of a three-year, limitations period.[38]

The defendants and third-party defendants cross-appealed to the Second Circuit.[39] The Second Circuit held that the district court appropriately denied the defendants' constitutional and statutory interpretation challenges to 42 U.S.C. § 9658.[40] Additionally, the court determined that the district court correctly found the plaintiffs' claims subject to the applicable one-year limitations period.[41] The majority also concluded, however, that there were tria-

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could have determined that the Landfill caused their injuries was December 1994 when the Rigle-Sawyer Report was released. *See id.*

On September 22, 1999, in *In re Pfohl Bros. Landfill Litig.*, 68 F. Supp. 2d 236 (1999) (*Pfohl II*), the district court granted the defendants' motion to dismiss, finding that the "plaintiffs had not 'show[n] . . . that a material issue of fact exists as to the earliest time when they should have reasonably discovered the cause of their alleged injury making their claims timely under [CPLR] § 214-c(4) as modified by § 9658.'" *Id.* at 193. The *Pfohl II* court determined that the plaintiffs should have developed "reasonable suspicion" as to the cause of their injuries prior to the end of 1991 because the defendants' reports were available before the end of 1991. *See id.* at 194. Ultimately, the court concluded that the plaintiffs' claims were time-barred, and judgment was entered pursuant to Federal Rules of Civil Procedure 54(b). *See id.* at 195; *see also* FED. R. CIV. P. 54(b) (announcing rule for judgment upon multiple claims or involving multiple parties).

36. *See Freier*, 303 F.3d at 182 (noting plaintiffs' appeal to Second Circuit Court of Appeals).

37. *See id.* (presenting plaintiffs' contention on appeal that district court erred as matter of law). The plaintiffs appealed from the district court judgment pursuant to Federal Rules of Civil Procedure 54(b), dismissing claims alleging personal injuries caused by toxic substances transported to and maintained in the Landfill. *See id.*; *see also* FED. R. CIV. P. 54(b) (discussing judgment upon multiple claims or involving multiple parties).

38. *See Freier*, 303 F.3d at 182 (establishing plaintiffs' contentions on appeal concerning length of limitations period). The issues on appeal concerned the statutes of limitations regarding the plaintiffs' claims. *See id.* at 183. There had been no settlement on the causation issue, and the court expressed no view on the merits of the causation issue. *See id.*

39. *See id.* at 195 (detailing defendants' cross-appeals). The defendants and third-party defendants urged that judgment be affirmed on the ground that 42 U.S.C. § 9658 was unconstitutional because it exceeded Congress's Commerce Clause power and violated the Tenth Amendment. *See id.* The United States ultimately intervened, arguing for § 9658's constitutionality. *See id.* at 182. The defendants also argued for partial affirmance on the basis that § 9658 does not pertain to "claims involving the death of a plaintiff's decedent." *Id.*

40. *See id.* (addressing court's agreement with district court on statutory interpretation and constitutional issues).

41. *See id.* (describing court's agreement with district court's ruling that one-year statute of limitations applied).

ble issues of fact concerning when the plaintiffs reasonably should have known that the Landfill materials caused their injuries.[42]

III. BACKGROUND

A. Enactment of CERCLA

Congress enacted CERCLA in 1980.[43] CERCLA's purpose was to remedy the adverse consequences of improper transportation and disposal, improperly maintained disposal sites, and spills.[44] CERCLA's ultimate statutory goal was "to protect the natural environment and save human lives by facilitating the cleanup of environmental contamination and imposing costs on the responsible parties."[45] CERCLA supplies federal funding and authority to clean up hazardous substances and recover costs from parties responsible for the contamination.[46] In 1986, SARA amended CERCLA to increase State and citizen involvement with site cleanups.[47] When a responsible party is unknown, the EPA administers a trust fund through CERCLA to pay for cleanups.[48]

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42. *See id.* (noting that Second Circuit concluded there were factual issues remaining concerning date when plaintiffs should have known sources of their injuries). The Second Circuit vacated the district court's decision and remanded the case for further proceedings. *See id.*

43. *See* Knox v. AC & S, Inc., 690 F. Supp. 752, 754 (S.D. Ind. 1988) (noting enactment of CERCLA); *cf.* United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 556 (W.D.N.Y. 1988) (holding that chemical company was strictly, jointly and severally liable under CERCLA for costs incurred prior to passage and implementation of CERCLA scheme). *See generally* United States v. Hooker Chem. & Plastics Corp., 850 F. Supp. 993, 997-98 (W.D.N.Y 1994) (referring to section 107(a) of CERCLA).

44. *See Knox*, 690 F. Supp. at 757 (discussing purpose of CERCLA). The 1980 CERCLA required the President to promulgate a National Priorities List (NPL) to identify the highest priority sites for cleanup. *See* Diane M. Connolly, Comment, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 UCLA L. REV. 1737, 1744 (1986). The NPL lists sites posing substantial risk to human health or the environment and helps EPA to determine which sites should be further investigated. *See id.* at 1744-45. The Pfohl Brothers Landfill is listed on the NPL. *See* EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 14, at 51.

45. Robert G. Ruggieri, Note, Broward v. Environmental Protection Agency: *CERCLA's Bar on Pre-Enforcement Review of EPA Cleanups Under Section 113(h)*, 13 VILL. ENVTL. L.J. 375, 375 (2002) (noting ultimate goal of CERCLA statute).

46. *See id.* at 381 (assessing CERCLA's resources and goals).

47. *See Knox*, 690 F. Supp. at 754 (noting that SARA amended CERCLA in 1986); EPA SUPERFUND, *SARA Overview*, *at* http://www.epa.gov/superfund/action/law/sara.htm (last updated Oct. 21, 2003) (describing SARA's additions and changes to CERCLA legislation).

48. *See* EPA SUPERFUND, *CERCLA Overview*, *at* http://www.epa.gov/superfund/action/law/cercla.htm (last updated Oct. 21, 2003) (describing law and response actions that law authorizes). *See generally* Ohio v. EPA, 838 F.2d 1325, 1331-32 (D.C. Cir. 1988) (holding that EPA rules requiring EPA pre-approval before

B. Determining When Statutes of Limitation Run for Hazardous Substance Exposures

1. Purpose of State Statutes of Limitation

State statutes of limitation identify the time in which an injured party, seeking compensation for injuries, may bring a claim against the party responsible for the injuries.[49] New York law provides various dates on which a toxic tort claim may accrue, including "(1) the date of the victim's first exposure to the toxic substance, (2) the date of discovery of the injury, . . . and (3) the date of discovery of the injury's cause."[50] For toxic tort claims in New York, the date of injury is the date of first exposure to the toxic substance.[51] Sections 214(5) and 214-c of New York's Civil Practice Law and Rules (CPLR) govern personal injury or property damage claims, including survival claims.[52] Section 214-c provides a three-year limitations period for personal injury claims caused by hazardous substances.[53] Additionally, Section 214-c states that if a party does not bring a toxic tort claim within three years of the discovery-of-injury date, the party must show that medical or scientific knowledge "'sufficient to ascertain the cause of his injury had not been discovered, identified or determined within that three-year period.'"[54] New York's Estates, Powers & Trusts Law (EPTL) gives a two-year limita-

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private party could obtain Superfund reimbursement for cleanup of hazardous waste site and limiting pre-approval to action taken at NPL sites did not violate Superfund legislation); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1084 (1st Cir. 1986) (holding that party seeking to recover CERCLA section 107 response costs need not comply with 60-day waiting period when it does not seek reimbursement of its response costs from Superfund). Pfohl Brothers Landfill site information is available in the EPA Superfund Information Systems database. *See* EPA SUPERFUND INFORMATION SYSTEMS, *CERCLIS Hazardous Waste Sites: Pfohl Brothers Landfill Site Information*, *at* http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0201751 (last updated July 25, 2003).

49. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (defining statute of limitations); *cf.* Hudson River Fishermen's Ass'n v. Westchester County, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988) (holding that when Government litigates corollary enforcement effort, parties with suits under Clean Water Act may not "maintain their actions simply to secure 'personalized' relief").

50. *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 183 (2d Cir. 2002) (discussing accrual of toxic tort claims under New York law).

51. *See id.* at 184 (defining date of injury).

52. *See id.* at 183 (outlining CPLR section 214-5). CPLR section 214-c became effective in July 1986 and modifies section 214(5). *See id.* Survival claims are claims for pre-death injuries to a decedent's person or property. *See id.*

53. *See id.* at 184 (noting length of section 214-c limitations period).

54. *Id.* (discussing CPLR section 214-c provisions) (quoting N.Y. CPLR § 214-c(4) (McKinney 1990)).

tions period for wrongful death claims.[55] The EPTL limitations period commences on the date of the decedent's death.[56]

2. Introduction of Federally Required Commencement Date

Before CERCLA section 309 (42 U.S.C. § 9658) was introduced by SARA, CERCLA section 301(e) required a congressional study of "'the adequacy of existing common law and statutory remedies in providing legal redress for *harm to man* and the environment caused by the release of hazardous substances into the environment.'"[57] The study's findings revealed that, due to state law accrual dates, some state statutes deprived parties of due process.[58] With diseases that lay dormant for years, such as cancer, a party could be barred from bringing a claim if the limitations period ran at the time of the first exposure instead of when the party "discovered" that a hazardous substance caused the injury.[59] The study concluded that the commencement date of the statute of limitations was more important than the duration of the limitations period.[60]

In 1986, Congress enacted 42 U.S.C. § 9658 to mandate when the statute of limitations should begin to run if state limitations commenced before a party determined the cause of his or her injury.[61] Section 9658 provides a federally required commencement date (FRCD) for toxic tort claims.[62] To trigger the FRCD, a toxic tort action must be based on state law and allege personal injury or property damage from exposure to hazardous substances, pollutants or contaminants.[63] The FRCD is the "date the [party] knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[64] The

55. *See Freier*, 303 F.3d at 183 (explaining two-year limitations period for wrongful death claims provided by New York's Estates, Powers & Trusts Law (EPTL)).

56. *See id.* (addressing EPTL limitations period).

57. *Id.* at 199 (quoting 42 U.S.C. § 9651(e)(1), which describes purpose of Congressional study).

58. *See id.* (discussing report by panel of lawyers concerning state law accrual dates).

59. *See id.* (noting congressional committee findings).

60. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (discussing conclusion of study).

61. *See id.* (addressing reason for FRCD development).

62. *See id.* (discussing provision of FRCD for toxic tort actions under § 9658).

63. *See id.* (describing FRCD under CERCLA section 309).

64. *Freier*, 303 F.3d at 199 (defining Congressional intent and purpose of FRCD); *see* 42 U.S.C. § 9658(b)(4)(a) (providing definition in statutory form). *See generally* Gail Howie Conenello, *New York District Court Adopts FRCD for Statute of*

FRCD does not create a separate federal cause of action.[65] Instead, the FRCD preempts state statutes of limitation if (1) state law claims are based on hazardous substance releases and (2) the applicable limitations period provides a commencement date earlier than federal law.[66]

3. *Federally Required Commencement Date Precedent*

a. *Constitutional and other challenges*

Numerous constitutional challenges and other issues concerning the elements necessary to trigger the FRCD have arisen.[67] One case challenging the FRCD's constitutionality was *Bolin v. Cessna Aircraft Co.*.[68] *Bolin* involved a homeowners' suit against a corporation for allegedly contaminating a groundwater supply.[69] The corporation argued that the FRCD, which preempted the state's commencement date statute, was unconstitutional under the Tenth Amendment and the Commerce Clause.[70] The District Court of Kansas found that the FRCD was a valid exercise of Congress's Commerce Clause power and did not violate the Tenth Amendment.[71]

Another relevant case, *Tucker v. Southern Wood Piedmont Co.*[72] demonstrates the interplay between a state statute of limitations and the FRCD.[73] In *Tucker*, property owners filed federal and state claims against wood treatment companies that exposed them to hazardous substances.[74] The Eleventh Circuit Court of Appeals denied the companies' motion to restrict the property owners' state law claims to damage that occurred during the four years preceding

Limitations, 7 NO. 11 N.Y./N.J. ENVTL. COMPLIANCE UPDATE 4 (1999) (discussing various aspects of FRCD).

65. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (explaining relationship between FRCD and federal causes of action).

66. Angeles Chem. Co., Inc. v. Spencer & Jones, 51 Cal. Rptr. 2d 594, 599 (Cal. Ct. App. 1996) (citing Tower Asphalt, Inc. v. Determan Welding & Tank Serv., Inc., 530 N.W.2d 872, 875 (Minn. Ct. App. 1995)).

67. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (addressing FRCD case law characteristics). *See generally* Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1107 (E.D. Tenn. 1996) (holding that CERCLA does not violate Commerce Clause).

68. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991).

69. *See id.* at 697-705 (detailing factual basis of lawsuit).

70. *See id.* at 705-09 (discussing FRCD constitutionality in toxic tort claim).

71. *See id.* at 706-09 (finding § 9658 valid under congressional commerce power, and rejecting Tenth Amendment challenge).

72. Tucker v. S. Wood Piedmont Co., 28 F.3d 1089 (11th Cir. 1994).

73. *See id.* at 1090 (describing basis of case).

74. *See id.* at 1090-91 (noting property owners' claims).

their filing.[75] The court discussed the FRCD's effort to "deal with the inadequacies of many state tort systems regarding the delayed discovery" of a toxic substance release.[76]

Courts have also examined the extent to which parties must know the identity or concentration of the specific contaminants.[77] In *Reichhold Chemicals, Inc. v. Textron, Inc.*,[78] a chemical corporation moved for summary judgment against an industrial site owner's complaint for costs under CERLCA.[79] The Florida Northern District Court found that the FRCD does not require any particular threshold or concentration of hazardous substance.[80]

Defining the limits of the FRCD, *First United Methodist Church of Hyattsville v. United States Gypsum Co.*[81] involved a property owner's claim against a manufacturer.[82] The owner brought an action to recover the removal cost of asbestos-containing plaster produced by the manufacturer.[83] Contractors used the plaster to construct the owner's building in 1961 and for repairs in 1969.[84] The Fourth Circuit Court of Appeals held that "because CERCLA does not authorize response cost recovery actions for removal of asbestos from the structure of a building," the FRCD did not preempt the Maryland state law repose period.[85] Similarly, the claimant in *Covalt v. Carey Canada Inc.*[86] was exposed to asbestos in the workplace, and fifteen years later discovered he had asbestosis and lung cancer.[87] The Sev-

75. *See id.* at 1091-93 (explaining Eleventh Circuit Court of Appeals decision).

76. *Id.* at 1091 (discussing FRCD effort to deal with inadequacies of state tort systems).

77. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (noting FRCD case law characteristics).

78. Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116 (N.D. Fla. 1995).

79. *See id.* at 1119-20 (noting parties in case).

80. *See id.* at 1125-26 (describing requirements for bringing action under statute). *See generally* State v. Motorola, Inc., 774 F. Supp. 566, 576 (D. Ariz. 1991) (holding that grinding sludge is "hazardous substance" within meaning of CERCLA).

81. First United Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989).

82. *See id.* at 864 (noting who parties were on appeal).

83. *See id.* (discussing property owner's action to recover cost of removal of asbestos-containing plaster produced by manufacturer and installed in church).

84. *See id.* (noting that asbestos-containing plaster was used to construct property owner's church from 1961 to 1962 and in repairs performed in 1969).

85. *Id.* at 869 (holding that FRCD did not preempt Maryland state law repose period because CERCLA did not authorize recovery for removal of hazardous substances in interior of buildings).

86. Covalt v. Carey Canada Inc., 860 F.2d 1434 (7th Cir. 1988).

87. *See id.* at 1435 (discussing party's exposure to asbestos in workplace and later discovery of asbestosis and lung cancer).

enth Circuit Court of Appeals held that the FRCD preempted state law "only with respect to releases into the environment."[88] According to the Seventh Circuit, the "interior of a place of employment is not 'the environment'" for CERCLA purposes.[89]

b. When an individual should "know or reasonably should know" cause of injuries

Since CERCLA's enactment, courts have developed methods for determining when parties should "know or reasonably should know" the cause of their injuries.[90] In many instances, courts have determined that the standard under state discovery rules is "suspicion."[91] In *F.P. Woll & Co. v. Fifth & Mitchell Street Corp.*,[92] a purchaser of real property asserted CERCLA claims against a former owner whose previous tenants contaminated the property.[93] The District Court for the Eastern District of Pennsylvania granted the former owner's motion for summary judgment because the purchaser knew more than two years before filing the complaint that a government agency "suspected" the prior tenants of contaminating the property.[94]

In *O'Connor v. Boeing North American, Inc.*,[95] claimants asserted personal injury, wrongful death and property damage actions based on corporations' release of hazardous pollutants.[96] The District Court for the Central District of California granted in part and denied in part the corporations' motion for summary judgment.[97] The court determined that a person "reasonably knows" about an injury and its cause when he or she "reasonably suspects" an injury and its cause.[98]

88. *Id.* at 1436 (noting that FRCD preempts state law only with respect to environmental releases).

89. *Id.* at 1439 (determining that Superfund Act regulates "waste dumps and other leakages 'into the environment'" and that workplace interior is not "'the environment'" for CERCLA purposes).

90. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (describing court precedent in determining when claimants should reasonably know of injuries).

91. *See id.* (describing state discovery rules).

92. F.P. Woll & Co. v. Fifth & Mitchell St. Corp., 48 ERC 1362 (E.D.P.A. 1999).

93. *See id.* (describing contamination of property).

94. *See id.* at 1364 (noting that EPA suspected that operations of prior tenants contributed to contamination at site).

95. O'Connor v. Boeing N. Am., Inc., 92 F. Supp. 2d 1026 (C.D. Cal. 2000).

96. *See id.* at 1027 (discussing actions brought by claimants).

97. *See id.* (noting corporations' summary judgment motion).

98. *See id.* at 1050-51 (addressing suspicion of cause of injuries).

Similarly, *Rivas v. Safety-Kleen Corp.*[99] involved claims against manufacturers and suppliers of allegedly toxic chemicals and compounds.[100] The California Court of Appeals determined that a statute of limitations accrues when a party suffers injury and "'suspects or should suspect that [his or] her injury was caused by wrongdoing.'"[101] The *Rivas* court emphasized that the injured party "'must go find the facts'" and "'cannot wait for the facts to find [him or] her.'"[102]

In *In re Asarco/Vashon-Maury Island Litigation,*[103] Asarco argued that the publicity and environmental effects related to its smelter operation put the residents of Vashon-Maury Island on constructive notice of their claims.[104] The Washington Western District Court concluded that the residents did not receive sufficient notice to commence the statute of limitations.[105] The court found a genuine issue of fact as to whether publicity surrounding the smelter was "sufficiently pervasive and notorious to create constructive knowledge."[106]

IV. NARRATIVE ANALYSIS

In *Freier*, the plaintiffs argued that the district court erroneously ruled that they reasonably should have known the cause of their injuries before the end of 1991.[107] The plaintiffs claimed that the district court erred in ruling that the federally required commencement date (FRCD) was not later than the end of 1991.[108] Additionally, the plaintiffs asserted that the district court erred in ruling that they were required to file suit within one year after the

99. Rivas v. Safety-Kleen Corp., 119 Cal. Rptr. 2d 503 (Cal. Ct. App. 2002).

100. *See id.* at 506 (describing appellants' claims).

101. *Id.* at 522 (discussing statute of limitations) (quoting Jolly v. Eli Lilly & Co., 751 P.2d 923, 927 (Cal. 1988)).

102. *Id.* (noting claimants' responsibilities) (quoting *Jolly*, 751 P.2d at 928).

103. In re Asarco/Vashon-Maury Island Litig., No. C00-695Z, 2001 U.S. Dist. LEXIS 7154 (W.D. Wash. May 23, 2001).

104. *See id.* at *6 (discussing Asarco's argument).

105. *See id.* (noting Asarco's claims).

106. *Id.* at *22 (noting court's findings).

107. *See Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 195 (2d Cir. 2002) (noting plaintiffs' argument that district court erroneously ruled that they should have known cause of injuries before end of 1991). Justice Kearse wrote for the majority. *See id.* at 182. The plaintiffs did not dispute the district court's ruling that New York law would time-bar their claims if FRCD were not applied. *See id.* at 195.

108. *See id.* (asserting Plantiffs' FRCD claim).

discovery-of-cause date, even if that period would end less than three years after the discovery-of-injury date.[109]

The defendants and third-party defendants cross-appealed.[110] They sought affirmance that the FRCD does not apply to wrongful death or survival claims.[111] Also, the defendants argued that the FRCD exceeds Congress's powers under the Commerce Clause and violates the Tenth Amendment because it alters state law commencement dates of a statute of limitations period for state law claims.[112]

A. Defendants' Statutory Interpretation Challenges

The Second Circuit addressed the defendants' statutory interpretation challenges.[113] The court upheld the district court's ruling that 42 U.S.C. § 9658 encompasses survival and wrongful death claims under New York law.[114] Concerning the defendants' constitutional challenges to § 9658, the majority determined that enacting the FRCD was a valid exercise of Congress's Commerce Clause powers.[115] The court also reasoned that the FRCD does not violate the Tenth Amendment.[116] Moreover, the Second Circuit found the plaintiffs' claims subject to the one-year limitations period following the discovery-of-cause date.[117]

B. Plaintiffs' Challenge to the Ruling That the FRCD Was Not Later Than the End of 1991

The Second Circuit next considered the plaintiffs' challenge to the district court's ruling that the FRCD was not later than 1991.[118]

109. *See id.* (discussing applicable discovery-of-cause and discovery-of-injury dates).

110. *See id.* (explaining cross-appeal by defendants and third-party defendants).

111. *See id.* (describing cross-appeals by defendants and third-party defendants).

112. *See Freier*, 303 F.3d at 195 (discussing reasons why defendants and third-party defendants argued that FRCD exceeds Congress's powers under Commerce Clause and violates Tenth Amendment).

113. *See id.* at 195-200 (addressing defendants' statutory interpretation challenges).

114. *See id.* at 197-200 (noting Second Circuit's view of whether § 9658 encompasses survival and wrongful death claims).

115. *See id.* at 203 (providing court's view of FRCD as "valid exercise of Congress's powers under the Commerce Clause" and as necessary to further CERCLA goals).

116. *See id.* at 205 (recognizing that FRCD does not violate Tenth Amendment).

117. *See Freier*, 303 F.3d at 210-11 (discussing length of limitations period).

118. *See id.* at 205 (introducing plaintiff's FRCD challenges).

The court examined the district court's application of legal standards and view of the factual record.[119] From this examination, the majority ascertained triable issues of fact existed regarding when the plaintiffs reasonably should have known the cause of their injuries.[120]

1. *The Second Circuit's Examination of the Legal Standards Applied by the District Court*

The Second Circuit determined that the district court erroneously imputed to the FRCD "a standard of 'reasonable suspicion.'"[121] The court reasoned that the lower court incorrectly accepted the defendants' argument that reasonable suspicion of an injury caused by exposure to toxic or hazardous substances is sufficient to trigger the statute of limitations.[122] The majority rejected this argument because the FRCD discovery-of-cause standard centered on actual or imputed knowledge, not on suspicion.[123] The court noted that mere suspicion could not "be equated with knowledge."[124] Further, the Second Circuit discussed how a claimant's "reasonable suspicion" that the Landfill caused injuries was not sufficient to find that the claimant "reasonably should have known" that the Landfill caused injuries.[125] The court concluded that the

119. *See id.* at 205-11 (providing summary of district court analysis).

120. *See id.* at 182 (determining when plaintiffs reasonably should have known that Landfill materials caused injuries).

121. *Id.* at 205. The court discussed the FRCD "reasonable suspicion" standard. *See also, e.g., Pfohl II*, 68 F. Supp. 2d at 253. The *Pfohl II* court stated that the plaintiffs "should have developed a reasonable suspicion as to the cause of their injuries prior to the end of 1991." *Id.* The *Pfohl II* court found that "given the volume of information available to the public prior to 1992, [the] plaintiffs could be expected to reasonably suspect the cause of their cancers before the end of 1991." *Id.* at 254. Additionally, the *Pfohl II* court concluded that "no reasonable trier of fact could find that [the] plaintiffs, had they been reasonably diligent in inquiring as to the cause of their cancers upon being diagnosed, would not have discovered sufficient information to develop a reasonable suspicion as to the cause of such injuries prior to the end of 1991." *Id.* at 257. The defendants argued that "a reasonable suspicion . . . is sufficient to trigger a rule of limitations that is predicated on knowledge of a fact or event." *Id.* at 252.

122. *See Freier*, 303 F.3d at 205-06 (reasoning that district court incorrectly accepted defendants' argument that reasonable suspicion of injury is sufficient to trigger rule of limitations).

123. *See id.* (discussing FRCD discovery-of-cause standard). The FRCD discovery-of-cause standard is defined as "'the date the [claimant] knew (or reasonably should have known) that the personal injury'" was caused or contributed to by the hazardous materials.'" *Id.* at 205.

124. *Id.* (describing problem with mere suspicion).

125. *Id.* at 206 (finding that mere suspicion does not equate to knowledge of injuries).

district court used a flawed legal standard when interpreting the FRCD.[126]

Under New York's CPLR section 214-c(4), a claimant must show medical or scientific knowledge regarding the cause-of-injury.[127] The majority decided that the district court incorrectly applied an "impossibility of such knowledge" standard to the CPLR provision.[128] The lower court interpreted this standard to require a claimant to prove that the cause of the injury "could not have been" determined within three years after the discovery-of-injury date.[129] The Second Circuit determined that this interpretation did not match the statutory language.[130] Section 214-c(4) of CPLR asserts that if an action is not filed within the three-year period, the claimant must show that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" before that period expired.[131]

Based on the New York practice commentaries, the court discussed how the New York Legislature "apparently intended . . . [that] the test should be: Was the requisite scientific knowledge reasonably available to the [claimant] during the three-year discovery period?"[132] The Second Circuit considered this the correct interpretation of New York law because the district court's interpretation would burden a potential claimant in a manner contrary to legislative intent.[133] The majority rejected the idea that the New York

126. *See id.* (noting legal standard applied by district court).

127. *See Freier*, 303 F.3d at 206 (explaining New York's CPLR section 214-c(4)).

128. *Id.* The court discussed the "standard of impossibility" of knowledge. *See, e.g., Pfohl II*, 68 F. Supp. 2d 236, 248 (1999) (requiring plaintiffs to show that state of scientific knowledge was insufficient such that it was not possible to discover cause of injuries in time to commence present actions "within three years from the discovery of their cancers"); *id.* at 257 (failing to establish existence of material issue of fact that such cause could not have been determined before end of 1991).

129. *Freier*, 303 F.3d at 206 (discussing district court's interpretation of standard).

130. *See id.* (finding that district court improperly interpreted statutory language).

131. *See id.* (discussing statutory meaning). *See generally* N.Y. CPLR § 214-c(4) (McKinney 1990) (stating statutory rule).

132. *Freier*, 303 F.3d at 207 (discussing New York Practice Commentaries). *See generally* N.Y. CPLR § 214-c(4) (McKinney 1990) (stating statutory rule).

133. *Freier*, 303 F.3d at 207. For example, the district court concluded that the plaintiffs were unable to satisfy the "cause-could-not-have-been-determined" standard because they could have hired experts to prepare an environmental studies report before the end of 1991. *Id.* The court determined, however, that the reasonable cost of such a study would have been at least two million dollars. *See id.*

Legislature's CPLR provision, and even Congress's FRCD "reasonably should have known" standard, referred to scientific knowledge a claimant could obtain only through expensive studies.[134]

The Second Circuit concluded that the official commentary's view correctly interpreted that CPLR section 214-c(4) referred only to "reasonably available" scientific knowledge.[135] The majority found it possible that the New York Legislature wanted to create an accrual date no earlier than "the date the [claimant] knew or reasonably should have known the cause of the injury," thereby matching the FRCD accrual date.[136] Additionally, the court stated that even if section 214-c(4)'s scientific knowledge provision requires an accrual date earlier than the date the claimant knew or reasonably should have known the cause of injury, the FRCD preempts it.[137]

2. *The Second Circuit's Examination of the District Court's View of the Factual Record*

Based on the district court's view of the factual record, the Second Circuit determined that the district court incorrectly applied "the principles applicable to the consideration of a motion for summary judgment."[138] Deciding that the FRCD was not later than the end of 1991, the district court concluded that the defendants' media and government reports "establish[ed] that a highly publicized controversy existed within the local community over whether the Landfill posed a threat to the health and safety of those who resided or worked" in the Landfill vicinity.[139] The district court found that these documents should have raised reasonable suspicion regarding the cause of the plaintiffs' injuries.[140] Furthermore, the district court concluded that the plaintiffs failed to establish "a material issue of fact that such cause could not have been determined" before the end of 1991.[141]

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134. *Id.* (discussing nature and expense of studies).

135. *See id.* (relating reasonableness standard).

136. *See id.* (discussing accrual dates in relationship to reasonableness standard).

137. *See id.* (noting CPLR section 214-c(4) scientific-knowledge provision).

138. *See Freier*, 303 F.3d at 207. In considering a motion for summary judgment, the court must "view the factual record in the light most favorable to the party against whom summary judgment is sought" and "draw all factual inferences in favor of that party." *Id.*

139. *Id.* (discussing district court conclusions about defendants' media and government reports).

140. *See id.* at 208 (quoting *Pfohl II*, 68 F. Supp. 2d 236, 253 (1999)).

141. *See id.* (discussing district court ruling).

The Second Circuit discussed two problems concerning the district court's reliance on the defendants' documents.[142] First, the defendants' documents lacked scientific knowledge that the Landfill caused cancer.[143] The majority determined that even though the defendants sought summary judgment against the plaintiffs, the district court did not view the defendants' documents in the light most favorable to the plaintiffs.[144] The Second Circuit also noted that the absence of scientific reports linking the Landfill to cancer contributed to the defendants' insistence that the 42 U.S.C. § 9658 reasonably-should-have-"known" standard could be satisfied by showing reasonable "suspicion."[145]

Second, in determining the date that the plaintiffs "reasonably should have known" the cause of their injuries, the Second Circuit criticized the district court for not considering the entire record.[146] The Second Circuit noted that the district court failed to consider the plaintiffs' evidence.[147] For example, the majority learned that the district court did not take into account 1991 studies that gave no reason to suspect that the Landfill caused cancer.[148] Moreover, publicity surrounding the 1991 reports and subsequent state and federal government studies reported no link between cancer and the Landfill.[149] The court determined that notice of controversy

142. *See id.* (noting difficulties with district court ruling).

143. *See Freier*, 303 F.3d at 208. The defendants submitted an October 11, 1988 DEC letter to "Concerned Citizen[s]" stating that the Landfill's low radiation levels did "not present any immediate threat to public health." *Id.* In addition, the defendants submitted statements from news articles. *See id.* On October 14, 1988, a *Buffalo News* article stated that "radiation levels" at the Pfohl Landfill, according to DOH and DEC, "pose[d] no threat to the public." *Id.* In *The Buffalo News* on November 2, 1989, a State expert explained that radiation risks from the Pfohl Landfill were "'very, very minimal.'" *Id.* In *The Buffalo News* on March 30, 1980, the DEC stated that radiation exposure on the site "'present[ed] little, if any, public health hazard.'" *Id.* On November 15, 1990, *The Buffalo News* described that no health threat was found in Pfohl Road soil tests. *See id.*

144. *See id.* (discussing district court's ruling).

145. *See id.* (noting nature of articles and reports).

146. *See id.* (relating problems with district court ruling).

147. *See id.* at 208-09 (discussing importance of considering plaintiffs' evidence).

148. *See Freier*, 303 F.3d at 209. In addition, Dr. Melius, the director of the DOH division, stated in his affidavit that he gave local residents many explanations for the increased cancer rates, including "socioeconomic factors, improved screening practices, personal lifestyle and medical history." *Id.* In meetings with residents, DOH members never told the public that the area cancers were related to the Landfill. *Id.*

149. *See id.* In the *Cheektowaga Times* on December 2, 1993, an article stated how "ground water surrounding the Pfohl Brothers dump ha[d] turned up clean in all studies performed so far." *Id.* On August 26, 1994, *The Buffalo News* reported that "two studies by federal and state agencies refute[d] charges that contamina-

was not the standard for determining the FRCD.[150] The record did not authorize the district court to determine that "no reasonable factfinder could fail to infer that [the] plaintiffs reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries."[151] State agencies did not find the Landfill carcinogenic and State officials assured residents through reports and meetings that it was not.[152] The Second Circuit, therefore, concluded that the public should not have known otherwise.[153]

C. The Length of the Limitations Period

The plaintiffs also argued that the district court incorrectly ruled that a one-year limitations period governed their survival claims.[154] The plaintiffs discussed elliptical district court statements of the FRCD's effect.[155] The Second Circuit found that the district court applied the correct principle.[156] The appellate court emphasized how "the FRCD preempts a more restrictive state law only with respect to the date on which a claim accrues, not with respect to the length of the limitations period."[157] The majority then asserted that New York law controls the length of the limitations period.[158] Section 214-c gives a claimant one year from the discovery-of-cause date to commence a lawsuit or, if longer, three years from the discovery-of-injury date.[159]

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tion from the Pfohl Brothers dump in Cheektowaga . . . caused serious health problems." *Id.* In addition, an August 1994 USATSDR report found "no apparent public health hazard at the present time." *Id.*

150. *See id.* at 210 (explaining standards for determining FRCD).

151. *Id.* (discussing impact of record on district court decision).

152. *See id.* (noting that State officials assured residents through reports and meetings, and that State agencies did not find Landfill carcinogenic).

153. *See Freier*, 303 F.3d at 210 (noting Second Circuit conclusion).

154. *See id.* (discussing plaintiffs' length of limitations period argument).

155. *See id.* According to the court, such statements only indicated that the "effect of the FRCD, where suit was not brought within three years of the discovery-of-injury date, is to allow a [party] to bring suit within one year after discovery of the cause of an injury, even if more than five years have elapsed since discovery of the injury." *Id.* at 211.

156. *See id.* (describing how court interprets district court opinion).

157. *See id.* at 210 (noting how FRCD preempts more restrictive state law); 42 U.S.C. § 9658(a)(1) (2000) (stating that "if the applicable [state law or common law] limitations period . . . provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the [state law] date").

158. *See Freier*, 303 F.3d at 210 (noting that New York law controls with respect to length of limitations period).

159. *See id.* (explaining function of section 214-c).

D. The Holding

The Second Circuit found the parties' arguments on appeal meritless, except for the plaintiffs' argument that "genuine issues of material fact precluded the granting of summary judgment."[160] The court vacated the judgment and remanded the case for proceedings consistent with its opinion.[161] The court also awarded costs to the plaintiffs.[162]

E. The Concurring Opinion

In his concurring opinion, Judge Leval stated that "the scientific knowledge proviso of section 214-c(4) is incompatible with the FRCD, and that the majority's discussion of the various possible meanings of the proviso is therefore superfluous."[163] Judge Leval agreed with the majority that section 214-c satisfied FRCD requirements by providing a party one year from the discovery-of-cause date to commence a lawsuit or, if longer, three years from the discovery-of-injury date.[164]

To qualify for section 214-c(4)'s discovery-of-cause accrual date, Judge Leval stated that a claimant must satisfy two conditions: (1) the discovery-of-cause must have occurred less than five years after discovery-of-injury and (2) the claimant must satisfy the scientific knowledge proviso.[165] This proviso requires a party to show that "'technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered within three years of discovering the injury.'"[166] Claimants who fail to make this showing must comply with section 214-c(2)'s limitations period, which is unlawful under the FRCD because its accrual date is earlier than any allowed by the federal statute.[167] Judge Leval noted that the majority opinion recognized this situation when it stated, "'To the extent . . . that the scientific-knowledge provision of CPLR section 214-c(4) imposes an accrual date earlier than the date on which a [claimant] knew or reasonably should

160. *Id.* at 211 (addressing court conclusions).

161. *See id.* (noting that court vacated judgment and remanded case).

162. *See id.* (discussing majority opinion).

163. *Freier*, 303 F.3d at 211 (Leval, J., concurring) (noting concurring judge's disagreement with majority opinion).

164. *See id.* (Leval, J., concurring) (agreeing with majority opinion).

165. *See id.* (Leval, J., concurring) (discussing section 214-c(4)'s discovery-of-cause accrual date).

166. *Id.* at 211-12 (Leval, J., concurring) (defining scientific knowledge proviso).

167. *See id.* at 212 (Leval, J., concurring) (explaining that section 214-c(2)'s limitations period is unlawful).

have known the cause of the injury, it is . . . preempted by the FRCD.'"[168] Judge Leval found the majority's discussion of the New York Legislature's intended meaning of the scientific knowledge provision useless.[169]

V. CRITICAL ANALYSIS

A. "Reasonable Suspicion" Standard

In *Freier*, the Second Circuit compared the defendants' evidence of publicity and warnings and the plaintiffs' evidence of official reassurances.[170] The majority analyzed the evidence to determine whether the plaintiffs' claims were "time-barred on the ground that there was no genuine issue of fact to be tried as to the date on which their claims accrued under the FRCD."[171] The Second Circuit's opinion is internally consistent in its FRCD discussion.[172] Nevertheless, the court's conclusions are distinguishable from the district court and prior cases.[173] The district court found that the public controversy and government reports concerning the Landfill's health hazards created a "reasonable suspicion" as to the cause of their cancer before the end of 1991.[174] Additionally, the district court concluded that the plaintiffs unsuccessfully showed "why it was not possible to obtain a 'scientific' opinion similar to the one contained in the Rigle-Sawyer Report" before 1994.[175]

The Second Circuit determined that the district court incorrectly attributed a "reasonable suspicion" standard to the FRCD.[176] The Second Circuit also established that the FRCD's discovery-of-cause standard should center on "knowledge, actual or imputed, not on suspicion."[177] By differentiating "reasonably should have known" from "reasonably should have suspected," the Second Cir-

168. *Freier*, 303 F.3d at 212 (Leval, J., concurring) (quoting majority opinion).
169. *See id.* (Leval, J., concurring) (evaluating substance of majority opinion).
170. *See id.* at 207-10 (discussing evidence reviewed by Second Circuit).
171. *Id.* at 205 (noting issue of case and prior procedural determinations).
172. For a narrative analysis of the *Freier* decision, see *supra* notes 107-69 and accompanying text.
173. For a discussion of CERCLA and the statutory and judicial background of section 309 (42 U.S.C. § 9658), see *supra* notes 43-106 and accompanying text.
174. *See Freier*, 303 F.3d at 205 (describing findings of district court).
175. *Id.* (furthering explanation of legal standards applied by district court).
176. *See id.* (noting district court interpretation of FRCD).
177. *Id.* (describing focus of FRCD).

cuit clarified the standards for when claims accrue under the FRCD.[178]

The majority justifiably distinguished past cases that used a "reasonable suspicion" standard to determine when a person "reasonably knows" about an injury.[179] For example, in *F.P. Woll & Co.*, the District Court for the Eastern District of Pennsylvania granted the former landowner's motion for summary judgment because the purchaser knew that a government agency "suspected" previous tenants of contaminating property for two years prior to filing a complaint.[180] In addition, the District Court for the Central District of California in *O'Connor* concluded that a person "reasonably knows" about an injury and its cause when he or she "reasonably suspects" an injury and its cause.[181]

The Second Circuit correctly interpreted the FRCD.[182] The court stated that "[t]he discovery-of-cause standard set by the FRCD, defined as 'the date the [claimant] knew (or reasonably should have known) that the personal injury' was caused or contributed to by the hazardous materials, focuses on knowledge, actual or imputed, not on suspicion."[183] This FRCD interpretation is consistent with established rules of statutory construction because it provides a basis for ruling "as a matter of law that the claimant 'reasonably should have known'" the cause of the injury.[184] Thus, although contrary to other court holdings, the Second Circuit properly interpreted the FRCD.[185]

178. *See id.* at 206 (noting FRCD standards); O'Connor v. Boeing N. Am., Inc., 92 F. Supp. 2d 1026, 1036 n.19 (C.D. Cal. 2000) (discussing "reasonably should have known" and "reasonably should have suspected" standards).

179. *See* O'REILLY & BUENGER, *supra* note 7, § 9:17 (comparing "reasonably should have known" and "reasonably should have suspected" standards).

180. *See* F.P. Woll & Co. v. Fifth & Mitchell St. Corp., 48 ERC 1362, 1370 (E.D.P.A. 1999) (noting that EPA suspected that operations of former tenants contributed to contamination at site).

181. *See O'Connor*, 92 F. Supp. 2d at 1050-51 (addressing suspicion of cause of injuries).

182. For a discussion of the judicial background of CERCLA section 309 (42 U.S.C. § 9658), see *supra* notes 43-106 and accompanying text.

183. *Freier*, 303 F.3d at 205 (discussing definition of FRCD discovery-of-cause standard).

184. *Id.* at 206 (noting consistency with statutory construction rules).

185. For a discussion of the judicial background of CERCLA section 309 (42 U.S.C. § 9658), see *supra* notes 43-106 and accompanying text.

B. The Concurring Opinion

In his concurring opinion, Judge Leval found the scientific proviso of CPLR section 214-c(4) incompatible with the FRCD.[186] Furthermore, the concurrence noted that the "majority's discussion of the various possible meanings of the proviso" was superfluous.[187] Despite Judge Leval's concurrence, the majority's discussion of the different possible meanings of the scientific knowledge proviso has merit.[188] In the majority's view, the district court's interpretation that a claimant must show that a cause of injury "could not have been" determined within three years after the discovery-of-injury date did not match the statutory language.[189] The majority's discussion of the New York Legislature's official commentary revealed that the Legislature "apparently intended [that] the test should be: Was the requisite scientific knowledge reasonably available to the [claimant] during the three-year discovery period?"[190]

The majority correctly recognized that the FRCD requires state law toxic tort claims to not accrue before a claimant knows or reasonably should know the cause of injury.[191] The distinction between the "could not have been" and "reasonably available" standard was relevant to determine that Congress did not intend what a claimant "reasonably should know" to mean information available only through expensive commissioned studies.[192] The majority's analysis of CPLR section 214-c(4) provided a "correct interpretation of that section" because it was consistent with legislative history.[193]

VI. IMPACT

Although CERCLA provides a necessary legislative framework to clean up hazardous waste sites, congressional intent with respect to specific CERCLA provisions remains unclear and highly liti-

186. *See Freier*, 303 F.3d at 211-12 (Leval, J., concurring) (stating concurring opinion).

187. *Id.* (Leval, J., concurring) (comparing majority opinion and concurring opinion).

188. For a narrative analysis of the *Freier* decision, see *supra* notes 107-69 and accompanying text.

189. *See Freier*, 303 F.3d at 206 (discussing district court's interpretation of statute).

190. *Id.* at 207 (discussing New York Legislature's official commentary).

191. *See id.* at 207 (acknowledging FRCD requirements for state law toxic tort claims).

192. *See id.* at 206 (discussing relevance of "could not have been" and "reasonably available" standard).

193. *Id.* (noting majority's interpretation of CPLR section 214-c(4)).

gated.[194] State law accrual dates, formulated when mass exposure to environmental toxins was unforeseen, generally work against victims of hazardous substance exposure.[195] The FRCD, however, "envisions the . . . viability of state remedies for environmental injuries," while ensuring that restrictive state limitation statutes do not cause injured parties to forfeit their CERCLA claims.[196]

The *Freier* decision further supports the contention that the FRCD provides a uniform standard for determining accrual dates due to hazardous substance exposure under 42 U.S.C. § 9658.[197] In *Freier*, the Second Circuit rejected the "reasonable suspicion" standard maintained in past cases.[198] Instead, the majority properly concluded that 'reasonable suspicion' is not sufficient to find that a claimant 'reasonably should have known' that hazardous substance exposure caused their injury.[199] This FRCD interpretation will likely "reduce the burden on innocent parties" under CERCLA.[200]

In addition to providing courts with guidance on proper FRCD interpretation, *Freier* will likely increase industry compliance with CERCLA.[201] Until Congress enhances CERCLA by resolving ambiguities in the statute, judicial interpretations of CERCLA will have to "promote industry responsibility by forcing potentially liable parties to internalize the costs of toxic waste generation, transportation and storage."[202] The *Freier* decision will also increase the likelihood that CERCLA remedial action will be taken against hazardous substance exposures.[203]

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194. *See* Note, *Developments in the Law – Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1660 (1986) (describing mixed success of governmental responses to problems caused by hazardous substance releases).

195. *See* Chapin, *supra* note 1, at 129-30 (discussing how tort rules work against hazardous substance exposure victims).

196. *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 708 (D. Kan. 1991) (noting importance of § 9658 in CERCLA's regulatory scheme).

197. *See* Conenello, *supra* note 64, at 4 (discussing purpose of FRCD).

198. *See Freier*, 303 F.3d at 205-06 (discussing "reasonable suspicion" standard). For a discussion of the judicial background of CERCLA section 309 (42 U.S.C. § 9658), see *supra* notes 43-106 and accompanying text.

199. *See Freier*, 303 F.3d at 206 (discussing sufficiency of "reasonable suspicion").

200. Connolly, *supra* note 44, at 1772 (noting that assessing liability early reduces innocent parties' burdens).

201. *See Freier*, 303 F.3d at 194-212 (discussing FRCD interpretation). *See generally* Note, *supra* note 194, at 1660 (discussing CERCLA judicial interpretations).

202. Note, *supra* note 194, at 1660-61 (noting ambiguities of CERCLA and importance of industry responsibility).

203. *See generally id.* at 1660 (describing options to improve government's record on compensation and cleanup).

The court's reasoning in *Freier* is broad and will affect hazardous waste litigation practice within the Second Circuit's jurisdiction and other jurisdictions.[204] The Second Circuit's interpretation joins industry, government and public parties in providing a remedy for injuries caused by hazardous substance exposures.[205] Decreasing hazardous waste production should be this country's long-term environmental goal.[206] Present and future generations, though, will immediately benefit from the Second Circuit's interpretation of the FRCD "reasonably should have known" standard.[207]

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204. For a discussion of CERCLA and the statutory and judicial background of section 309 (42 U.S.C. § 9658), see *supra* notes 43-106 and accompanying text. For a narrative analysis of the *Freier* decision, see *supra* notes 107-69 and accompanying text.

205. *See* Note, *supra* note 194, at 1660-61 (addressing importance of industry responsibility); *see also* A. Brooke Rubenstein & David Winkowski, Note, *A Mine is a Terrible Thing to Waste: Past, Present and Future Reclamation Efforts to Correct the Environmentally Damaging Effects of Coal Mines*, 13 VILL. ENVTL. L.J. 189, 215 (2002) (describing environmental goals of community).

206. *See* Connolly, *supra* note 44, at 1774 (discussing efforts to clean up hazardous wastes).

207. *See* Spear, *supra* note 1, at 150-51 (describing congressional goals of protecting present and future generations from exposure to toxic hazards). For a narrative analysis of the *Freier* decision, see *supra* notes 107-69 and accompanying text.